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## TRIAL BY COMBAT AND THE NEW DEAL

ANGLLO-AMERICAN judicial theory constantly emphasizes that only the particular and narrow issues brought before courts by contesting parties may be the basis of judge-made law. Judicial language not necessary for the decision of those narrow issues is called by the uncomplimentary name of dicta. The impression is given that legal rules and principles based on mere dicta are of doubtful validity. A court is not supposed to regulate situations merely because regulation is badly needed. A court should never approve, disapprove, or clarify an entire set of rules governing a general business situation. A court should never answer questions. The limits of their power in this direction is to produce parables out of which further arguments may be spun.

What the issues of a case are depends upon the record, beyond the limits of which no court should go. The pronouncement that assuming certain facts to be true, such would be the law applicable, which is familiar to continental judges, is supposed in this country to indicate loose judicial thinking. The court might be aware, as men of common sense, that the parties desired a general rule to be adopted or rejected, or the parties might even stipulate that such was their desire. Nevertheless, the court would be powerless to discuss the rule or principle if the record, judged in the light of certain technical rules, did not raise those precise issues.

## TYPICAL RESULTS OF EMPHASIS ON "ISSUES"

The most frequent illustration of this attitude is found in the repeated exhortation of appellate courts that counsel stay within the record. The doctrine of judicial notice becomes at times a convenient escape from this limitation but counsel can never know how far they may rely on it. Oral arguments are filled with remarks which indicate how fixed the attitude is in the minds of the court. For example, in the recent case of *Nebbia v. People of the State of New York*,<sup>1</sup> a case designed to test the constitutionality of far-reaching legislation, argument before the Supreme Court of the United States on the question of the power of the state to fix prices was stopped while counsel was asked to point out in the record where it appeared that the defendant was a milk dealer, rather than a person who had just happened to sell a quart of milk for the first and last time in his life. It was apparent that the sole purpose of the case was to test the power of a state to fix prices. There was a deliberate attempt to exclude all other issues. One hearing the argument might easily have gained the impression that a careless omission in the record might prevent the court from making a decision for which vast interests were anxiously waiting.

So hallowed is this tradition that the most absurd results are accepted without comment. In a recent case a receiver was appointed for a large manufacturing company.<sup>2</sup> He sold the property to a new corporation made up of the original owners. Objecting creditors carried the case on appeal to the Supreme Court of the United States. In the meantime the new corporation went into bankruptcy. Another receiver's sale was held. The property was purchased again by the original owners for a much lower price. When the appeal on the first sale was argued the objecting creditors tried in vain to get a decision which included in its scope the second sale. But the tradition was too strong. The bankruptcy sale was not within the issues of an appeal involving the equity sale. It could not be made part of the record. There was no way known to legal learning by which the court could keep up with this rapidly moving litigation. It was unable to perform

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<sup>1</sup> U. S. Sup. Ct., March 5, 1934.

<sup>2</sup> *Coriell v. Morris White, Inc.*, 54 F.(2d) 255 (C. C. A. 2d, 1931), *rev'd*, *sub nom.* *National Surety Co. v. Coriell*, 289 U. S. 426 (1933).

the very necessary function of a clearing house where the various actions of different lower tribunals, all acting on the same general dispute, could be brought together.

In another recent case the court decided that all indictments for offenses against the prohibition law may no longer be prosecuted because the law has been repealed.<sup>3</sup> The court said in its opinion that a case where final judgment was rendered prior to the ratification of the constitutional amendment presented an issue not before the court. The attorney general had taken the case to the Supreme Court for the sole purpose of getting information on what to do in these situations. But the court felt itself bound by tradition to withhold part of the relevant information, and to compel a second suit to determine it.

We may at times even transcend the limits of the record provided our purpose is not to remedy inadequate presentation of issues, but to show that the parties desire information on the law without going through the risks of a combat. Thus in the recent *Lake Cargo Rate* case,<sup>4</sup> the entire coal industries of Pennsylvania and West Virginia were awaiting an interpretation of the Interstate Commerce Act. A bitter dispute was in process of litigation. The Interstate Commerce Commission had been enjoined from requiring a certain differential between West Virginia and Pennsylvania coal mines. In order to clarify the situation pending an appeal, a compromise rate had been approved. This was considered by the parties to be only a necessary compromise until the Supreme Court could make its decision. Instead of deciding the question which had required so much time and effort to bring before them, the Supreme Court held that no "issues" were before it. Because a new rate had been approved in the interim the case was "moot". Therefore the Court could not speak. The whole litigation had to be begun over again.

Even the court's regulation of its own administration must generally be made at the risk of the parties. In the recent receivership of the Interborough Rapid Transit of New York Judge Manton's right to appoint the receiver and supervise the receivership

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<sup>3</sup> *United States v. Chambers*, 54 Sup. Ct. 434 (1934).

<sup>4</sup> *United States v. Anchor Coal Co.*, 279 U. S. 812 (1929). In commenting on this case Mr. Harvey Mansfield says: "So ended, in a grand anticlimax, five years of litigation, pursued at a cost, to all concerned, of millions of dollars." *MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY* (1932) 133.

proceedings was questioned.<sup>5</sup> The matter assumed the proportions of a public scandal.<sup>6</sup> The Supreme Court of the United States, after an appeal properly taken, finally indicated that Judge Manton had acted in doubtful taste, though not without jurisdiction. It suggested his withdrawal. This very sensible solution, however, was obvious from the first. The mails were open between New York and Washington, and the trains were running on regular schedules. Only tradition prevented an immediate judicial intervention by the Supreme Court without trial or appeal, without public battle between members of the federal court. Yet matters involving millions of dollars had to remain up in the air until the case could be presented to the Supreme Court in the guise of legal issues presented on a record.

The outcome of the case was amusing. Inasmuch as the Supreme Court advised, rather than commanded, Judge Manton adopted an attitude of defiance. It began to look as if the whole matter would have to be brought before the Supreme Court again in the same cumbersome way by means of additional proceedings, when the Judge decided to withdraw.<sup>7</sup> Thus a matter purely of judicial administration is embalmed among the parables in the Supreme Court reports, instead of being part of its minutes and correspondence. The man on the street is somewhat puzzled as to why this administrative question could not have been frankly and informally answered by the Court without so much controversy as to the way in which it was asked.

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<sup>5</sup> *Johnson v. Manhattan Ry.*, 1 F. Supp. 809 (S. D. N. Y. 1932), 61 F.(2d) 934 (C. C. A. 2d, 1932), 289 U. S. 479 (1933); see Note (1933) 46 HARV. L. REV. 503; (1932) 42 YALE L. J. 279.

<sup>6</sup> See Frankfurter, N. Y. Times, Oct. 14, 1932, at 18.

<sup>7</sup> The chronology of events is as follows. On Aug. 26, 1932, Judge Manton appointed the receiver of these vast properties. After the matter had gone to the Supreme Court, Judge Manton in a memorandum opinion on June 28, 1933, stated that he would continue to act in the case. Thereafter an affidavit of bias and prejudice was filed by the Manhattan Railway Co. It was stricken from the files by Judge Manton on Aug. 2, 1933. Thereupon a petition for a writ of mandamus and prohibition was filed in the Supreme Court of the United States by the Manhattan Railway Co. An order restraining action in the matter by Judge Manton pending hearing on the petition for mandamus was signed by Mr. Justice Stone on Sept. 21, 1933. Shortly prior to the hearing of the petition Judge Manton withdrew from the case. Thus the matter of what judge should sit on this case was litigated for over a year. The inconvenience resulting to investors and creditors because the judicial system could invent no sensible way of quickly settling disputes between its own officers can easily be imagined.

Today we find lower federal courts utterly at a loss to know at what stage in proceedings under the codes their opinions should be invoked under the device of injunctions. Cases with differing results are appearing all over the country. Assuming that courts are to review the decisions of the various new tribunals which assume such an important place in industrial affairs, no one can tell in advance either the time of that review, or its scope. It falls vaguely under the heading of administrative law. The possibilities of review range from *habeas corpus*, mandamus, injunction, down through the various doctrines of the criminal law. Yet it does not appear to be possible to hold a conference of judges to plan general rules of appeal from these tribunals, or a coherent scheme for judicial participation in the administration of recovery legislation. Such matters can only be determined at the peril of litigants, when they are presented in the form of contested issues.

The Department of Agriculture was engaged in negotiating a milk agreement and license in the state of New York. The Attorney General of New York examined the cases and announced that the proposed action by the Department was unconstitutional.<sup>8</sup> The government proceeded with its negotiations. When the action is taken, there will be no way in which judicial approval or disapproval of its terms can be obtained. The parties must operate under a cloud until one of them decides to litigate. Even the litigation may not decide anything, because, if the usual method of starting suit by injunction is taken, the question immediately arises whether the party raising the issue has exhausted his legal remedies. The courts are a necessary part of the system which finally approves marketing agreements, licenses, and codes. Yet their participation in this system is based on a sort of catch-as-catch-can philosophy.

The major points of constitutionality of the recovery legislation will soon be decided. Yet the particular provisions of the hundreds of codes will always be in question. A tentative or qualified judicial approval during the period of experiment, while such provisions are in operation, is made very difficult by the notion that courts can finally decide only on issues brought before them, because time, and place, the parties, and the scope of the

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<sup>8</sup> See N. Y. Times, March 6, 1934, at 1.

decision are all left to Providence, aided by prevailing conceptions of pleadings, the record, and *res judicata*.

Of course, cases may be fixed up to assist Providence in minor ways, but this process presents troubling and unsolvable ethical problems. In a recent instance the government desired an interpretation of an agricultural adjustment license. It was suggested that a corporation be formed which would violate the specific terms of the license on which a decision was wanted and thus present the question at the time, and in the place which administrative convenience considered advisable. The scheme was thought dangerous. No one quite knew whether it was ethical or not. It was argued that this was the most orderly way of getting the precise questions before the court to which answers were imperatively required by a waiting agricultural industry. Yet the spectacle of the government manufacturing a case to accomplish this violated a traditional attitude. It was, therefore, thought better to wait, in spite of the administrative confusion which resulted, until Providence in its infinite wisdom should send the right kind of a case. The difference between a moot case and a test case has never been defined and never will be. The only sure thing is that the one is bad, and the other perfectly proper.

The recent case of *Hillsborough Bank Corp. v. Yarnell*,<sup>9</sup> in which a Florida judge decided that the Agricultural Adjustment Act was unconstitutional, has been appealed. In the meantime it is desired to modify the license under consideration in that case. The following unanswerable questions arise: (1) Would the proposed modification of the license make the original case moot? (2) Assuming that the Agricultural Adjustment Administration wants a decision on a new license, must it depend upon the irrational processes of chance and a determined litigant for that decision, or is there some way of getting the new license into the old record?

Such difficulties may be multiplied indefinitely. They all reflect the same fundamental attitude, which may be summarized as follows. The function of the judiciary is to stay aloof from investigation and regulation. Rules and regulations must emerge only from contests. Each battle is a sort of war to end wars, because it will aid in the development of principles which will make future

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<sup>9</sup> (U. S. D. C., S. D. Fla., not yet reported).

contests unnecessary. Regulations made in advance after investigation of a total situation, rather than a particular case, are not judicial functions. They are turned over to administrative tribunals with a lower place in the governmental hierarchy. Each new extension of this power to regulate is regarded as a step toward bureaucracy. Bureaucracy must be curbed by the courts, but this can only be done by decisions approving or disapproving action or threatened action which has damaged, or is about to damage, some particular person. The rules themselves can never be reviewed as a whole by any judicial body, because review of regulation as a whole is not a judicial function.

#### ASSUMPTIONS UNDERLYING THE SEARCH FOR ISSUES

The suggestion that a court should be permitted to speak without a contested case before it has been met with an air of shocked surprise by such persons learned in the law as the writer has interviewed on the subject. It is considered dangerous in spite of the fact that in large areas of judicial participation in business, such as consent receiverships, this is exactly what the courts have been compelled to do. Courts for a long time have regulated insolvent business on the sensible lines of control instead of the romantic technique of battle. The difficulties have arisen only because the older tradition keeps courts from exercising enough control. Today, when something of the same type of regulation is being imposed upon solvent business, the notion of groups of individuals getting up plans and regulations for the approval of the court becomes a necessary development. Yet we still prefer a two-party injunction suit to test the operation of a code to a more sensible impartial examination at the request of interested groups who are not necessarily fighting each other. The reasons for this preference are worth examining.

The philosophical rationalization of why courts may not be trusted to clarify rules in confused situations, except by the hit-or-miss method of the occasional decision after a contest, is of course contradictory. That is to be expected. Every human institution is the embodiment of all sorts of contradictory ideals going in different directions. To each important institution is attached a priesthood devoted to the task of proving that which is neces-

sarily false, namely, that the institutional ideals are not contradictory, and that they are not going in different directions. In the law this is accomplished by a science known as jurisprudence. This science takes the simple emotional ideals to which the judiciary owes its popular acceptance and elaborates them into a literature with which it takes years to become thoroughly familiar. Few connected with the judicial institution know anything about this literature, and when, from a sense of duty, lawyers or judges peruse works which claim to be jurisprudence, they get a distinctly fuzzy feeling which they humbly attribute to their own incompetence. They are, however, profoundly grateful that a little group of scholars are taking over the task of examining the nature and sources of the law and finding them to be, on the whole, sound. Therefore, the fact that the assumptions underlying the science of jurisprudence, while pretending to be rational, are as a matter of fact completely irrational, escapes their attention. In the same way the complete irrationality of the theology preached in this country from 1800 to 1880, always escaped the good churchgoers because the length and complexity of the sermons convinced them that it must be rational. Where there is so much language there must be some truth.

The task of jurisprudence has been to make rational in appearance the operation of an institution which is actually mystical and dramatic, and which maintains its hold upon popular imagination by means of emotionally relevant symbols. If one were compelled to summarize the assumptions underlying the ideal of a lawmaking body, which never speaks except to settle a combat properly brought before it, the result would be somewhat as follows:

(1) Every trial should be a contest over issues presented by the parties and not an investigation of what the facts were which created the necessity of the suit.<sup>10</sup>

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<sup>10</sup> A typical statement is found in *Greenwich Trust Co. v. Brixey*, 117 Conn. 663, 166 Atl. 918 (1933). Counsel attempted to stipulate in the appellate court as to the authority of a trustee to pay taxes, and the court said: "On the other hand, the agreement of all counsel that the court should uphold the authority of the trustee to make the payment precludes the presentation to us of opposing contentions, which is one of the great assurances of the establishment of a sound precedent."

The struggle to preserve this same ideal is reflected in all the types of pleading difficulties to which our system has been subject. The difficulty is created by



(2) The unskillful antagonist should lose, because the rules should be so simple that it is his own fault if he does. Simplicity of rules is obtained by not permitting courts to clarify these rules except by penalizing one of the antagonists. To permit anyone to find out about them in advance would destroy the idea of a combat.<sup>11</sup>

(3) Courts are not permitted to plan their participation in a new situation, such as is presented by the recovery acts, any more than they were permitted to plan their participation in arbitration, rate making, or administrative law. This participation is rather to be determined by a series of battles. Each particular battle is a war to end war.<sup>12</sup>

(4) Rules governing human conduct will be better and more consistent if only a small section of that conduct is considered at a time. It is a mistake for a rule-making body to consider a situation as a whole.<sup>13</sup>

(5) The best way to avoid litigation is to make the power to promulgate rules and regulations exclusively dependent upon litigation.<sup>14</sup>

(6) Courts should keep their eyes fixed on the past and follow precedent. Legislatures should look to the future, and disregard it. Thus the two extremes will correct each other, if courts in making their decisions will only keep future policies in mind, and if legislatures will only have more respect for the past. Thus the

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the belief that if a rule of trial convenience is applied to determine what should be considered a "cause of action", it would prevent clear-cut issues from being presented to the courts. The cause of action, therefore, must be a single "right" on which the plaintiff can recover. In determining what is a right, we are inevitably led back to the old forms of action at common law. See Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 A. B. A. J. 215. Entire philosophies of the nature of proof have been based on the notion that a trial is and necessarily should be a contest over issues formulated in advance. MICHAEL AND ADLER, *THE NATURE OF JUDICIAL PROOF* (1931).

<sup>11</sup> The notion that rules of procedure should be worked out piecemeal by *stare decisis* persists in spite of criticism and attack for over a hundred years.

<sup>12</sup> See any text on administrative law.

<sup>13</sup> Note the reluctance with which courts exercise their rule-making power.

<sup>14</sup> Against this fundamental attitude liberal or realistic jurisprudence has dissented in vain—so deep-seated in our institution of thought has it been. The American Law Institute, starting out to restate the law, felt that it should do nothing to interfere with this ideal. The failure of this magnificent effort may be traced to the persistency of this notion. For a brilliant criticism of the ideal, see Cuthbert Pound, *Jurisprudence: Science or Superstition* (1932) 18 A. B. A. J. 312.

legislative and judicial functions will nicely balance each other, provided we set up enough administrative tribunals actually to do the work required.

These assumptions are reconciled with practical efficiency by the notion that courts are more apt to formulate or apply rules soundly if the opposite sides are prevented from sitting around a table together in friendly conference. Mutual exaggeration is supposed to create lack of exaggeration. Bitter partizanship in opposite directions is supposed to bring out the truth. Of course no rational human being would apply such a theory to his own affairs nor to other departments of the government. It has never been supposed that bitter and partizan lobbying assisted legislative bodies in their lawmaking. No investigation is conducted by hiring persons to argue opposite sides. The common law is neither clear, sound, nor even capable of being restated in areas where the results of cases are being most bitterly contested. And particularly with reference to administrative regulation does mutual exaggeration of opposing claims negative the whole theory of rational, scientific investigation. Yet in spite of this most obvious fact, the ordinary teacher of law will insist (1) that combat makes for clarity, (2) that heated arguments bring out the truth, and (3) that anyone who doesn't believe this is a loose thinker. The explanation of this attitude lies in the realm of social anthropology.<sup>15</sup>

These assumptions underlying the ideal of trial by combat are so pervasive that orderly exposition is difficult. Yet in the doctrine surrounding three of our most familiar phrases, *stare decisis*,

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<sup>15</sup> Referring to the difficulty of escape from this attitude Judge Cuthbert Pound says: "Can such changes be realized or approximated? They are not inevitable. They are not even popular with the bar. I can see a certain virtue in walking in peaceful error in the ancient ways rather than engaging in a struggle for the ideal system. 'Reformation' is not always synonymous with 'reform.' The old methods rest on a solid basis. As long as law is, to most people, something to keep out of and away from, it is not probable that the bar will be active in placing limitations upon its own esoteric activities. Some day, perhaps, some Bentham or Austin may arouse the people outside the bar associations to a movement to lessen the expense and the delay of litigation by radical and intelligent revision. Until then the bar will doubtless retain its characteristics of inertia, conservatism and lack of intellectual curiosity. The bench will, as usual, resist innovation and approach with dread any suggestion of cure, rather than mere palliation of symptoms which indicate weakened heart and lungs, myopia, loss of hearing and other ails of the body of administrative justice." See Pound, *supra* note 14, at 314.

the cause of action, and *res judicata*, and in the institutional effect of these doctrines, we may find some of the most pertinent illustrative material. Each one of these phrases stands at the head of a body of literature designed to separate and define the "issues". *Stare decisis* is concerned with what the issues are in appellate court opinions. *Res judicata* defines the issues in decisions by lower courts. And the definition of the "cause of action" is supposed to aid the trial judge himself to determine how issues may be brought before him. Here we have some of the most abstruse doctrine known to our legal literature, because the philosophy which permits courts to speak only on contested issues allows an authoritative definition of the issues to arise only out of cases where one of the issues is to define the issues.<sup>16</sup>

At the top we find the doctrine of *stare decisis*. The peculiar feature distinguishing it from rules like the "*jurisprudence constante*" of France is that statements in an opinion not required by the issues are dicta, and therefore not binding precedent. The philosophical difficulties of this position we will not here discuss. They have been ably elaborated by Mr. Goodhart,<sup>17</sup> who seeks to formulate a rule for determining between decision and dicta. The institutional results of insisting that binding precedent is based only on issues necessarily decided are far reaching. The most significant one is the attitude that a court cannot reverse an opinion, as does the Court of Cassation, but can only reverse a ruling. Thus it is difficult to make law without penalizing the

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<sup>16</sup> Note the attempt of a learned scholar to destroy the effect of Mr. Justice Cardozo's liberal attitude toward the code cause of action in the case of *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62 (1933). Gavit, *A "Pragmatic Definition" of the "Cause of Action"* (1933) 82 U. OF PA. L. REV. 129. The author reflects an interesting attitude common to many legal scholars in his lofty scorn of trial convenience. But see a reply to this. Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354.

<sup>17</sup> See Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 YALE L. J. 161. Mr. Goodhart shows that if the actual record of the case is taken into account, it is impossible to formulate any workable rules of *stare decisis*. The writer has criticized Mr. Goodhart's notion that the facts of the record must be ignored. See Arnold, Book Review (1931) 41 YALE L. J. 316. In the light of further reflection, such criticism now seems unfair. If *stare decisis* is to work at all, it must contain the artificial limitations which Mr. Goodhart imposes. The writer's attempt to poke fun at the limitation obscured the fact that Mr. Goodhart had done a real service in setting out with clarity the necessary logical implications involved in the acceptance of the doctrine of *stare decisis*. No one else has done this quite so well, and the writer is glad to make this belated apology for his criticism.

parties. Statutes prohibiting reversals on any error which is not "prejudicial" or which does not "go to the very right of the case" are almost universal. Yet in the teeth of such statutes courts constantly call errors in instructions, pleadings, or admission of evidence prejudicial when it seems almost certain that they had nothing to do with the "right of the case". They cannot escape the feeling that, if they decide that an erroneous ruling is non-prejudicial, the real decision in the case will be the ruling on prejudicial error. The statements of law as to error in the lower court will only be dictum. Even lower courts will respect the opinion less because they will know they can disregard it and not be reversed. On account of the fundamental attitude here described reversal seems the only practical way of keeping the lower courts in line. And so the plaintiff must continue to suffer vicariously for his attorney's sins, in spite of attempts to save him through "prejudicial error" statutes. Even putting the rule against prejudicial error in the constitution, as was done in California,<sup>18</sup> has had little effect. This should not surprise us, however, because procedural reform can never make headway against a deep-seated judicial ideal. The doctrine of non-prejudicial error realistically applied would make the decision on the law a separate thing from the decision between the parties. And this would work havoc with the picture of trial by combat.

Out of the same feeling that decisions can rest only on issues arises the interminable dispute as to the nature of the code cause of action, constantly standing in the way of practical trial convenience. Here are found our choicest bits of legal metaphysics. Dean Clark, by a test of practical trial convenience, attempted to

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<sup>18</sup> See *People v. Wilson*, 23 Cal. App. 513, 524, 138 Pac. 971, 975 (1913), where the court said: "The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied." See also *San Joaquin & King's River Canal & Irrigation Co., Inc. v. Stevenson*, 164 Cal. 221, 128 Pac. 924 (1912), 26 Cal. App. 274, 147 Pac. 254 (1915), 30 Cal. App. 405, 158 Pac. 768 (1916), 179 Cal. 533, 178 Pac. 292 (1919), 63 Cal. App. 767, 774, 220 Pac. 427 (1923). Five trials were had over a course of five years because of various errors which realistically could scarcely be called prejudicial. This was done in the teeth of the constitutional amendment. Yet the writer considers that California is more liberal in interpreting "prejudicial error" than most states.

reduce the subject to common sense.<sup>19</sup> The cause of action, he said, was whatever could conveniently be tried in one suit. This should be determined pragmatically in the particular case. This idea was attacked in a series of articles,<sup>20</sup> which illustrate the power of a judicial obsession over the minds of our legal scholars. Such a rule of practical trial convenience would confuse the issues in the pleadings, it is argued, and if the issues in the pleadings are confused, how can we tell which is law and which is dicta in the appellate courts? Unless issues are defined and separated, a decision based solely thereon cannot be made; it is the function of the pleadings to present the facts giving rise to separate legal rights, not to promote trial convenience, and so the argument goes. Reasoning so opposed to common sense is not interesting in itself. However, the fact that it can still be listened to respectfully in the practical field of procedure shows the pervading influence of the ideal of a contest over issues.

The doctrine of *res judicata* has suffered from the same philosophic attempts to define the issues until it has become almost impossible to state. The easy solution of the problem, namely, that *res judicata* should be treated as a loose, equitable rule, preventing parties from reopening cases after they had been fairly heard, would have appeared to be a confession that issues could not be exactly defined. To have explicitly recognized that *res judicata* might be different in different classes of cases would not have looked like a legal rule. Therefore, we have a general rule that the same issues are not to be retried between the same parties, which in representative suits dealing with interests of various groups of people, some actually in court and others in court only by implication, becomes a maze of conflicting analogies.

The effect on the various unrepresented groups and persons of the decisions passing on administrative regulation can scarcely be solved by the principles of *res judicata*. The prevailing doctrine of derivative suits permits whole groups of people to be repre-

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<sup>19</sup> See CLARK, CODE PLEADING (1928) 84.

<sup>20</sup> See Harris, *What is a Cause of Action* (1928) 16 CALIF. L. REV. 459; Gavit, *The Code Cause of Action: Joinder and Counterclaims* (1930) 30 COL. L. REV. 802 (stating the cause of action on the "substantive right"); McCaskill, *Actions and Causes of Actions* (1925) 34 YALE L. J. 614; cf. McCaskill, *Teaching Pleading so as to Meet Future as Well as Present Needs* (1932) 5 AM. L. SCHOOL REV. 286.

sented, in effect, by parties not of their own choosing. Decisions vitally affecting industry as a whole may be controlled by stipulations between two parties. Moreover, losing parties who do not appeal may be bound by *res judicata* to a decision which is contrary to the general code as finally interpreted.

#### METHODS OF AVOIDING TRIAL BY BATTLE

Devices exist for escaping from this ideal of a court permitted to speak only after a contest on definite issues, but they are not important enough to change the general effect of the attitude. Advisory opinions are occasionally given, but they are infrequent. Since most of the present regulation is national, they play little or no part in the present administrative difficulties. Authors of declaratory judgment acts have been careful to make them only a minor pleading reform. They insist upon issues and an actual controversy as prerequisite to declaratory actions. Hence the old question as to whether a case or controversy exists must be decided anew each time the declaratory judgment statute is invoked. There are various limitations, purely technical and all aimed to prevent courts from actual approval of general regulations under the declaratory judgment statutes. Confusion exists whether a declaratory judgment may be given on a question of fact (unless, perhaps, it is a simple, uncomplicated fact). The old ideal of trial by battle must be preserved even though the ancient fiction of asking for an injunction is done away with. So thoroughly conservative have been the reformers who advocated this legislation that it is very doubtful to the writer whether the declaratory judgment acts have done any more than add a new common-law writ. The very fact that it has surrounded itself with such an enormous body of learned literature, philosophy, and cases during the brief period of its acceptance in this country indicates that the framers of the acts have been anxious not to depart from the traditions of the past. Perhaps it has added something to what formerly could have been accomplished under a somewhat fictitious use of the injunction, but, if so, it is only in rare instances.<sup>21</sup> Declaratory

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<sup>21</sup> My colleague Professor Arnold has been kind enough to permit me to comment upon his views on the declaratory judgment. In his whimsical fashion he appears to have dealt somewhat cavalierly with the evidence. The declaratory

judgments which approve or disapprove of entire codes of administrative regulation are nonexistent. Declaratory judgments which are aimed at informing a trade group just what they may expect from a contemplated course of conduct are so rare as to be negligible.<sup>22</sup>

In view of this development of the declaratory judgment it is not surprising that it has not been received with enthusiasm in the federal system. The fundamental difficulty with this device in a

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judgment is not a minor pleading reform, nor is it a writ. It is a type of judgment which, by confining the judicial function to adjudication without execution, enables a court to decide two types of issues: (1) issues not theretofore determinable in any form of proceeding, thereby expanding the conception of "cause of action" to cases, for example, in which a plaintiff seeks to avert peril and insecurity and to obtain a decision before a possibly fatal leap in the dark (Borchard, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 793; Borchard, *Judicial Relief for Insecurity* (1933) 33 COL. L. REV. 648); and (2) issues theretofore determinable by a more expensive, cumbersome, or precarious method. It is in the second type of case that injunctions have often been abused to enable the court, as Professor Arnold says, to render a declaratory judgment. The suggestion that a declaratory judgment may not be given on a question of fact is unfounded. See *Hess v. Country Club Park*, 213 Cal. 613, 2 Pac.(2d) 782 (1931) (change of neighborhood); *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923) (identity of petitioner); *Ruislip-Northwood Urban Dist. Council v. Lee*, 145 L. T. R. 208 (1931) (character of property). See also other cases cited in Borchard, *The Uniform Declaratory Judgments Act* (1934) 18 MINN. L. REV. 239, 252-53. The suggestion that a declaratory judgment is a substitute for an injunction is also in the main unwarranted, for in innumerable declaratory judgments an injunction would have been quite impossible. The fact that many declaratory judgments have been rendered and that a literature concerning them has developed hardly seems a fair ground for criticism, but should be deemed an aid in determining the scope and limitations of the declaratory judgment. It is true, however, that a justiciable issue must be presented. As to what is a justiciable issue, our courts have been excessively cautious and our so-called liberal judges have been among the extreme conservatives in their conception of the judicial function and in their conception of the duty of judges to the litigants and to society. The nonchalance with which they dismiss, on a most technical construction of justiciability or of some procedural device, long-continued litigation in which adjudication is perfectly feasible, exposes them to justifiable criticism. Much of Professor Arnold's criticisms might be met by a more extensive use of the order to show cause, as embraced, for example, in Section 3 of the New Zealand Declaratory Judgment Act: "Where any person desires to do any act the . . . legality . . . of which depends on the construction . . . of any statute . . . such person may apply to the Supreme Court by originating summons . . . for a declaratory order determining any question as to the construction . . . of such statute." See Borchard, *supra*, 45 HARV. L. REV. at 845.

Edwin M. Borchard.

<sup>22</sup> See Borchard, *Declaratory Judgments in Administrative Law* (1933) 11 N. Y. U. L. Q. REV. 139.

situation requiring regulation is that it makes the parties rather than the court the judge of what issues shall be decided. It does not give the court an opportunity to go outside these issues, or to consider the effect of the decision on grounds not represented. In a situation, such as the present, when the Supreme Court may well desire to permit the various regulations being adopted to develop experimentally, it appears to force final decision on the court by taking away the language of escape which now surrounds injunction proceedings — which are, of course, declaratory judgments in disguise. Thus the general effect of the new writ is to continue to emphasize the difficulties of the search for contested issues, without offering any considered plan of judicial participation in the schemes of regulation which are now appearing. The method occasionally adopted of holding a suit open for purpose of experimental development, which is found in the *Appalachian Coals* case<sup>23</sup> and in the "Packers Consent Decree",<sup>24</sup> seems more suited to administrative needs. It is less in the form of a fixed rule applying to all cases, and it enlarges the possibilities of discretion without the cumbersome briefs which any suit defining the scope of the declaratory judgment now involves.

Arbitration, a frequently used escape from the judicial hunt for issues, has similarly met with confusion when it encountered that legal tradition. A reading of Mr. Sturges' brilliant and exhaustive treatise on arbitration indicates a great variety of attitudes toward judicial review of arbitration awards. There can be said to be no settled policy.<sup>25</sup> These tendencies are noted: (1) to let arbitration awards strictly alone, whether the arbitrators assumed an

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<sup>23</sup> *United States v. Appalachian Coals, Inc.*, 1 F. Supp. 339 (W. D. Va. 1932), *rev'd*, 288 U. S. 344 (1933).

<sup>24</sup> *Hearings Before a Sub-Committee On Agriculture and Forestry*, U. S. Senate, 67th Cong., 2d Sess., March 23, April 21, 1922; *In re Packers' Consent Decree Litigation*, Letter from the Att'y Gen., March 10, 1926, 69th Cong., 1st Sess., SEN. REP. No. 552; *Swift & Co. v. United States*, 276 U. S. 311 (1928); *United States v. California Coöperative Canneries*, 279 U. S. 553 (1929); *United States v. Swift & Co.*, 286 U. S. 106 (1932); see Donovan and McAllister, *Consent Decrees in the Enforcement of Federal Anti-Trust Laws* (1933) 46 HARV. L. REV. 885. The proceedings surrounding this consent decree are cited as an example of regulation by conference and investigation, rather than by definition of issues. Where proceedings under the Anti-Trust Law have taken the form of contests, the results have been notorious.

<sup>25</sup> STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* (1930); Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration* (1934) 47 HARV. L. REV. 590.



erroneous theory of law or not; (2) to interfere with awards if the court thinks that the law has been incorrectly applied; (3) to permit questions to be asked of the court on agreement of both parties; (4) to permit questions to be sent to the court on the demand of either party. The psychological effect of the first attitude set out above is that arbitration is an escape from law. Perhaps it is this which creates the numerous technical decisions on compliance with the arbitration statute. Certainly arbitration as an escape from law is an idea which bothers us. It indicates that our judicial system has been unable to include the settlement of many important types of disputes. Whether the treatment of arbitration awards as if they were reports of special masters would clarify the situation, no one can say. However, we consider the subject here as illustrative of the kind of difficulty which the idea of trial by combat involves when it meets practical necessities of modern disputes. The arbitration machinery has become a device to maintain the aloof position of courts and to isolate them from the technique of investigation and conference.

Perhaps the most useful and extensive device for asking the court questions has been the injunction.<sup>26</sup> In testing the recovery acts its use has been frequent. It is a common method of appeal from administrative bodies. The idea of a contest is preserved by the phraseology. A large discretion is given upon the principle that it will never be exercised unless the injury is irreparable. A paradoxical instance of this fiction is found in the case of *Hillsborough Bank Corp. v. Yarnell*<sup>27</sup> where a federal judge granted an injunction against prosecution of violators under an agricultural license, and immediately thereafter the circuit court of appeals stayed the injunction pending appeal. Yet because we do not regard this fictitious use of the injunction as actually fictitious, logical confusion follows. No one is sure whether irreparable injury is sufficiently alleged and proved or when a new administrative remedy is exhausted.<sup>28</sup> No one knows exactly whether an

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<sup>26</sup> This has given to review of administrative tribunals the aspect of a hearing on jurisdiction or *ultra vires*. See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) c. XI.

<sup>27</sup> (U. S. D. C., S. D. Fla., not yet reported); see note 9, *supra*.

<sup>28</sup> See, e.g., *First Nat. Bank of Albuquerque v. Albright*, 208 U. S. 548 (1908); *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 231 (1908); *Cavanaugh v. Looney*, 248 U. S. 453 (1919); *United States and I. C. C. v. Abilene & So. Ry.*, 265

injunction restraining government officials from prosecuting a violation of the code will make them liable for the prosecution when the injunction is later set aside. In Oregon a federal judge, in spite of his decision that a contested code provision was reasonable, nevertheless continued the order restraining prosecution for its violation.<sup>29</sup> He was not sure that the criminal penalties for violating the code were not so large as unconstitutionally to prevent the parties from fairly testing the validity of the statute. The theory is amusing. No one can test a code provision unless he has violated it. Therefore violation must not be so heavily penalized as to intimidate persons desiring to stand on their constitutional rights. It is perfectly proper to make the raising of a constitutional issue hazardous — but not too hazardous. A contest is insisted on, but not a cruel or unusual one. Thus a statute may be unconstitutional for the sole reason that its penalties prevent anyone from finding out whether it is constitutional or not.

Nevertheless, in spite of this logical confusion, the use of the injunction seems to satisfy emotionally the need for formulation of precise issues better than any other device, where the question of administrative remedies is involved. It might seem more logical to use the declaratory judgment, but actually this method is comparatively rare, probably due to the unfamiliar language of the formidable literature which has clustered about this more logical device.

The technique of corporate reorganization has gone far in escaping the limitations of precise issues. Here the court works through receivers, committees, and masters. Yet even here the influence of the ideal is felt in the reluctance to abandon the notion that the perfect legal analogy to selling a railroad is the justifiable sale of a farm to a hostile creditor.<sup>30</sup> The limitations of the record also

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U. S. 274 (1924); *Henderson Water Co. v. Corporation Comm. of N. C.*, 269 U. S. 278 (1925); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159 (1929); *Porter, Auditor v. Investors Syndicate*, 286 U. S. 461 (1932); *South Porto Rico Sugar Co. v. Munoz*, 28 F.(2d) 820 (C. C. A. 1st, 1928); *Royal Baking Powder Co. v. Federal Trade Comm.*, 32 F.(2d) 966 (App. D. C. 1929).

<sup>29</sup> See Note, *Validity of Allotment Order under Lumber Code; Suspension of Penal Provisions as to Litigant Challenging Order* (March, 1934) 43 YALE L. J.

<sup>30</sup> See Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 VA. L. REV. 541, 698.

make it difficult for the court to exercise a continuing supervision of related transactions after the reorganization plan has once been approved.<sup>31</sup>

#### PSYCHOLOGICAL REASONS FOR TRIAL BY BATTLE

The fact that the assumptions underlying the emphasis of our courts on issues are neither consistent nor rational should not be a source of surprise or a subject of criticism. The reasons given by the priesthood of a mystical institution for its prestige are never rational or consistent. The function of courts is largely dramatic, and drama, to be effective, must not adopt the technique of science. Disputes have to be settled, of course, in every society. But in modern government the manner of settlement is utilized as the exemplification of the ideals behind the government. In Greece courts did not occupy this peculiar position. In the early Puritan town meeting type of government, there was no emotional need for a principle-building judiciary. Yet far-flung governments from the time of the Roman Empire down have found the courts a convenient instrument for making real and important to the people the ideals on which their powers are based. Russia and Germany today are using courts to picture their governmental ideals with a frankness which is almost brutal. England and America are more subtle, but nevertheless accomplish the same ends. Therefore, the real reason for the idea that courts can try only ordeals by battle must be sought not in the rational explanations which are themselves part of the drama, but in a description of the public psychology which compels them to play that part.

The ideal of the common law, dramatized over and over again by courts, expresses individual freedom from regulation. The part it plays is supposed to be the antithesis of bureaucracy—the villain of the piece. It encourages business men to fight each other for business. It encourages litigants to fight each other to obtain law. It withholds legal rights from those who will not fight. Legal rights might become cheapened if they were handed down to those who do not spend time and money to obtain them. It is beneath the dignity of a court to become part of regulatory

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<sup>31</sup> *Coriell v. Morris White, Inc.*, 54 F.(2d) 255 (C. C. A. 2d, 1931), *rev'd, sub nom.* *National Surety Co. v. Coriell*, 289 U. S. 426 (1933); see note 2, *supra*.

machinery, even in a supervisory capacity, unless its interest was aroused at the sight of a combat.

Thus trial by ordeal developed into a trial by jury. The notion of a combat found a receptive environment in a society which was engaged in a struggle to give every man the freedom to fight his own battles with as little interference as possible. Judicial investigation could easily terminate in search and seizure and even regulation by judges. Bureaucracy and paternalism always lie in wait to ruin national character<sup>32</sup> by taking away the fighting instincts of the people. This being the ideal, we find courts presenting a series of miracle plays to give it a theatrical development. In the memory of the present generation the moral lesson of the judicial miracle play has been that rugged individuals are not regulated. Instead they fight for their rights. In this battle they expect government to let them alone.

Hence legislation, because it does not exemplify the ideal, is regarded as only transitory and ephemeral. Judicial principles,

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<sup>32</sup> Legal literature of the past ten years has been filled with dire warnings of the dangers of bureaucracy. In the last few years these warnings have assumed an indigo hue which is quite pathetic. See, for typical examples: McCarran, *The Growth of Federal Executive Power* (1933) 19 A. B. A. J. 587, 592: "Members of the Bar of America, are we turning backward? Have we made an 'about-face'? Is Democracy a failure? . . . Experiments are too costly, when they strike at a principal which secures individual liberty." Beck, *The Future of the Constitution* (1933) 19 A. B. A. J. 493, 540: "All we can do is to hope and pray that there will some day come a rebirth of the old spirit of ordered liberty, for unless it comes, not only will the Constitution perish in everything except in form, but the Union itself may not survive the destruction of its fundamental law." The Committee on American Citizenship, *An Appeal to the American Bar* (1934) 20 A. B. A. J. 15: "The Committee believes that for the last twenty-five years there has been a growing disbelief in the value of our constitutional form of government, and that the Constitution cannot long survive any want of faith in its essential justice and wisdom. As it is the organic expression of the Union, the Committee viewed with grave concern the fact that some leaders of thought, especially in the colleges and universities, are treating the moral authority of the Constitution with a feeling that borders on contempt." Fowler, *Encroachment by Government on the Domain of Private Business* (1932) 18 A. B. A. J. 567, 573, 617: "To invade the realm of commerce where the inhabitants carry on their business of agriculture, manufacturing, barter and trade, purchase and sale, transportation, banking and the numerous and complex activities which make up commerce as a whole, not only destroys individual initiative and ambition but seriously affects, and in the course of time will utterly destroy, the ability of the individual to support the Government by taxation." For more of the same kind of reaction, see any conservative paper.

illustrating the non-interference of government, appear permanent and philosophical. The old saying that any legislation could be repealed but that the common law endured forever illustrates this attitude. The great lesson of *stare decisis* is that the function of government is to allow free play to principles with the creation of which the government has nothing to do. What better theatrical development of this lesson could be devised than the notion that even courts could not prevent injustice when it occurred before their eyes. They could only decide issues in a contest.

As regulatory bodies expanded in power and influence the weight of all our philosophy and our judicial drama was aimed at keeping them on a lower plane. Principles of freedom did not find their habitation in surroundings where man is being directed for his own good. The Lord in Milton's *Paradise Lost*, confronted by the same problem, decides it is better to allow man to fall, than to take any active steps to help him out. He conceives his function to be that of judging man after he is plunged into the inevitable trouble which he foresees. A principle of equity jurisdiction softens that judgment somewhat, but the great principle that man could not be directed in advance without ruining his free will is developed with great dialectic fervor. Here we have poetically expressed the ideal of the common law. Results are supposed to be foreseeable at common law, just as they were in Paradise. Yet the fight between the Devil and the Lord is not subject to regulation. The litigant is penalized by hiring the devil as counsel. Anything else would create heavenly bureaucracy.

The acclaim given to *Paradise Lost* because of its ponderous way of expressing this ideal is not dissimilar to the acclaim given to legal scholars for performing a similar function. Milton and Blackstone thought very much alike. The same type of thinking is found in Hegel, in his elaborate development of the notion that out of the combat of antithesis comes synthesis on a higher plane.

In such a climate of opinion courts could follow no other ideal and retain their prestige. The extraordinary way in which leaders of judicial thought modified the rigor of the ideal, the great judicial literature written in terms of the ideal, the development of equitable doctrines which run counter to it but which nevertheless are reconciled with it, compel our admiration. Wars are doubtful instrumentalities for producing peace, quiet, and certainty, but

their effect in creating powerful institutions and great characters can never be denied by the most ardent pacifist.

Thus in the background of the things which we call substantive law we find that the most sacred and substantive of all is the notion that a court is privileged to decide only the issues before it, and that if it goes beyond this it indulges only in loose talk, a practice not exactly to be condemned, for dicta have their uses, but certainly not to be encouraged.

#### THE STRATEGIC POSITION IN WHICH THE IDEAL OF TRIAL BY BATTLE HAS PLACED THE JUDICIAL SYSTEM

In a society of clashing ideals and rapidly changing conditions, courts have been necessarily the representatives of the ancient order. They have been loyal to the theories of the common law. But, since the common-law judicial organization was the antithesis of social control, regulatory functions escaped into another system of courts, called commissions. In these bodies a different technique—the technique of conference and investigation—took the place of the technique of combat. The judicial system at first rejected the ideal that the proceedings of such bodies were their concern. Issues which required practical investigation rather than philosophical learning obviously were not “judicial”.

However, this administrative technique began rapidly to spread to problems so important that courts could no longer ignore them, and there arose the necessity of finding philosophical formulae which would make it possible to avoid the methods of investigation and conference and at the same time to assert judicial supremacy over decisions arrived at by these methods. The notion that they could decide only contested issues put the courts in an admirable strategic position. It gave them a constant escape from being rushed into interpretation of regulations at unpropitious times. It enabled them to take pot shots at specific regulations without ever being forced to assume responsibility for the regulatory scheme as a whole. The court could always refuse to review because the commission's decision was either final, or entitled to great weight on questions of “fact”. It could always take back into its power of review any field of the doctrine that certain facts were “jurisdictional” and, therefore, required

judicial determination. It could then throw these very jurisdictional facts back to the commission in cases (such as railroad rate decisions) where the evidence was too complicated for the judicial technique by declaring that the court need go no further than to ascertain whether there was typical evidence. It could escape all these formulae at once and regain jurisdiction by declaring that whether the commission acted in an arbitrary manner or whether they properly applied the law was solely a judicial issue. It could avoid talking about the matter at all by compelling the litigant to exhaust his administrative remedies, and escape from this rule in turn by stating that it might not apply to cases of unusual hardship. The court could invoke doctrines of estoppel and waiver if the litigant attempted to try out the regulatory scheme in an experimental way, and ignore these doctrines when review was desired by taking advantage of the fact that the seamless web of the law of estoppel and waiver was constructed on the general lines of Swiss cheese. By using injunctions to review the commissions, the court could add to these doctrines of administrative law all the loose formulae of equity which sound in discretion and good conscience. In this way to the two-story structure of law and equity was added a third story of administrative law, and the whole structure was equipped with noiseless elevators and secret stairways, by means of which the choice was always open either to take a bold judicial stand or make a dignified escape.

By these means courts were able to apply criteria to administrative tribunals without ever being compelled to elaborate as a complete whole what the criteria were. Thus was maintained great supervisory power with a minimum of executive responsibility. A new and curious legal science known as administrative law grew rapidly. Although it was the most important of the subjects in the legal field, because it contained the procedure for the treatment of the most important problems, it did not lend itself to the typical law school treatment. The American Law Institute never even attempted to restate it. Its comparative immunity from efforts by conventional legal scholars to clarify and classify it made administrative law an admirable method by which courts could keep a dignified distance from bodies which investigated and regulated instead of refereed.

The judicial position taken in the great areas of governmental regulation which include rates, zoning, workmen's compensation, taxation, and unfair trade practices preserved the illusion that the decision of fundamental principles of jurisdiction was the more important and dignified duty, and that actual regulation was a minor affair. It kept constantly before us the idea that administrative bodies, even when they acted as judges, were only quasi-judicial. However, the philosophy and argumentative technique required to maintain this idea became so complicated as to defy orderly statement. It was easy to imagine a more efficient method of review of administrative bodies, yet to put it into practice required a restating of fundamental concepts which would have given courts more direct responsibility. If the courts had been able to look at administrative agencies as they did at their own masters, referees, or receivers, elaborate formulae of administrative law, insofar as they described a method of review, would have been unnecessary. There would have been no necessity of appealing such an unimportant case as *Crowell v. Benson*<sup>33</sup> to the highest court in the land in order to get majority and dissenting opinions on the scope of judicial review over administrative tribunals. Under a scheme of discretionary review the courts would probably have let commissions alone because this is the history of discretionary review. Certainly they would not have had to reverse minor cases simply in order to keep formulating an analysis of the scope of their review. The judicial system might not have split up into a double-headed affair. It would have had the efficiency of a rational appellate organization in dealing with matters of regulation to which the older technique was not applicable.

The spectacle presented to the public of an administrative review similar to the approval of a master's report would have made the courts appear to approve or disapprove administrative regulations as they were formulated. It would have taken away their opportunity to talk in parables, and made them responsible for definite rules. The court would thus have appeared to be an investigating body, and not an arbiter of combats. We were accustomed to attack regulation by contrasting it with a type of gov-

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<sup>33</sup> 285 U. S. 22 (1932); see Notes (1933) 46 HARV. L. REV. 478, (1933) 42 YALE L. J. 747.



ernment which we designated as judicial. This could only be done by keeping the judiciary apart from regulation. The strategic advantage of the position which the vague ideal of *stare decisis* limited to precise issues, permitted courts to appear as the last refuge of unregulated individualism. For this purpose it was worth all the confusion which a separate science of administrative law threw upon the actual procedural situation.

#### THE PROBLEM IN 1934

There is today plainly needed an orderly, planned participation of courts in the growing area of governmental regulation. It is equally plain that suits between individuals are ineffective as a method of approving or disapproving governmental regulations. The real problem has become the balancing of interests of classes, and of different sections of the country. A system of judicial review which cannot become operative until after the damage is done, which pretends to affect only the parties to the suit directly, and the other parties in the same regulatory plan only by inference, which offers no certain and definite way of getting regulations reviewed in advance of their operation, will tend to isolate courts more and more from the place which they have heretofore had in the administration of our law.

We are faced with the conflict of two ideals, one representing governmental regulation of business, the other representing governmental noninterference with business. The second ideal is the older and finds its embodiment and dramatization in the older judicial system. The first ideal still encounters emotional difficulties. It is regarded by everyone except the radicals as a sort of necessary evil. We are endeavoring to conceal it under a series of euphemisms. The first is the somewhat naïve assumption that the present depression is an unheard of emergency never experienced in the world before, and, therefore, present developments are all temporary. A second euphemism is that courts may participate in a planned business economy through the medium of the ancient rules of joinder of causes and joinder of parties, which leave to the litigants themselves the sole responsibility of deciding what issues to present and who are to present them.

An elaborate group of administrative tribunals is rapidly taking

form.<sup>34</sup> In this scheme there is no place definitely allocated for judicial intervention. No one can possibly inform himself of just when administrative remedies are exhausted, and judicial review is permitted. The scope of judicial review is unsettled and left to the loose formulae of administrative law. Conflicting results are appearing all over the country.

Inconvenient results follow. Since the favorite method of reviewing any code provision found to be unreasonable is by the process of injunction, we find that a court is compelled to tie up an entire working arrangement in order to give an effective decision against a single code provision. Business cannot wait on the slow process of appeal. No code can be suspended while the Supreme Court is reaching a decision and then take up where it left off. Therefore, all code provisions are left at the mercy of lower federal courts. The winner of the first round practically stops the operation of an entire group, most of whom are not before the court.

No provision is made for an experimental operation of a code. Its provisions are either valid or invalid at the time of the decision and, theoretically, if the code is changed to meet the situation in the interim, the case becomes moot, because the old code is no longer in force. There is neither provision by which groups of diverse interests present a plan before a court, just as a reorganization plan is submitted in a situation where the court is permitted to go into all the relevant factors, nor any necessary representation of parties who are vitally interested but who may never have heard of the suit. A court might appoint a master to give a report on the entire industry, but this procedure has not occurred to any one as yet. Codes are valid or invalid on the analogy of books rather than on a present investigation of facts. Presumptions of

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<sup>34</sup> For some examples, see *MANUAL FOR ADJUSTMENT OF COMPLAINTS*, NRA, Bull. No. 7; *STATEMENT OF GENERAL POLICIES AND MODEL DRAFTS FOR MARKETING AGREEMENTS AND CODES OF FAIR COMPETITION*; Form M-14, Dept. of Agri., A. A. A. In these pamphlets is outlined the elaborate system of administrative boards which are already in existence. The reader will note that a complete and complicated appellate system is already in operation in the NRA. The confusion of appellate review by courts piled on appellate review by administrative boards, without definite planning as to procedural convenience, relying solely on vague formulae of equity and administrative law is clearly indicated by even a casual reading of these bulletins. For an excellent review of the legal situation at present, see Note (1934) 43 *YALE L. J.* 599.

the validity of the administrative action are, of course, verbal weapons to induce the court not to scrutinize too carefully, but no one knows just how far this doctrine goes.

The rules of *res judicata* are hopelessly inadequate to determine the effect on interested groups of legal decisions sustaining or upsetting code provisions, because no one knows whom the parties represent. No matter how important it might be to various groups to take an appeal, it is within the power of particular parties to compromise after a doubtful decision, without regard to the effect on numerous persons who are not represented. The situation is as if a corporate reorganization could be managed in court with only two parties, while all other parties were allowed to contest the same matter in any other court where the property of the corporation might be found.

Evidence taken at one of these judicial reviews of administrative action is becoming difficult to distinguish from argument. Indeed, the only certain difference between the affidavits of economic fact and the briefs is that the former are sworn to. Testimony on such questions of fact as whether interstate commerce and intrastate commerce are inextricably mingled is not testimony as we used to know it. The technique of the contested trial is obviously not suited to that type of judicial investigation requiring conference and advice, rather than combat.

Procedural difficulties such as the foregoing do not arise because of the selfishness of the bar or from the ignorance or lack of training of the judiciary. The function of procedure is to stage judicial proceedings in a dramatic way. Where the drama is attempted to exemplify conflicting ideals, the procedure becomes confused. Today, when the courts represent trial by battle, and the administrative bodies represent investigation and regulation, it becomes almost impossible to join the two procedures in an orderly and logical way. If everyone agreed that disputes arising out of administrative regulation should be investigated rather than tried, there would be little difficulty in formulating a procedure for judicial review of administrative regulation. Courts would simply look over the codes, approve them finally, approve them experimentally, or disapprove them completely. They would call all such groups which were considered to be vitally interested and hear their arguments. However, if the bar and the public gener-

ally assign two different rôles to the judicial and administrative courts, the procedure which joins them together is bound to become absolutely unintelligible.

We have, in our judicial history, fought our way through a double-headed system of law and equity courts representing conflicting ideals. The mountain of philosophic interpretation designed to show that this was a rational thing to do will be the marvel of future ages. Law represented rules and logical principles. Equity represented justice. Law called for a combat between two parties. A bill in equity called for a discovery and included as many parties as were necessary. Court organization and procedure were given the task of reconciling law and equity on the assumption that they were two different things, both working for the same end. This explains the involved theological dispute between those who contend that equity aids and assists the law, and those who contend that equity conflicts with the law. This entire dispute, curiously elaborate and philosophically profound, is aimed principally at the solution of a very simple procedural problem, namely, the determination of what counterclaims should properly be filed when equity and law are joined, and how equitable and legal issues should be tried. Under such circumstances trial convenience could come in only at the back door, if at all. The recognition of such practical considerations would have interfered with the dramatization of the two conflicting ideals.

Perhaps today we must go through with the same kind of verbal confusion. Administrative courts are being formed representing government by regulation. Legal courts must be continued which represent government by battle. We are still struggling with the confusion of ideas created by a double-headed system of law and equity courts, each of which was supposed to be a separate and distinct approach to the problem of administering justice, the one representing rules, the other justice. The way of thinking involved in this double-headed system was found in the prevailing intellectual climate of the times. Christian philosophy labored to explain how man, who was logically damned, could nevertheless be saved by means of a separate personality. The double-headed system of courts, therefore, reflected the general ideas of the layman. No one who listened to the sermons of the day could fail

to see the complete rationality of two courts, one representing justice, and the other representing mercy.

As the church began to be less doctrinaire about its theology, and during the same period that Emerson was hailed as our greatest moral philosopher, it seemed rational to combine these two functions into one court. Nevertheless both of the two ideals remained emotionally relevant. Neither lawyers nor laymen were willing to admit that philosophically each ideal did not have a separate existence. Efficiency demanded a merger. The philosophy of the time compelled continued separation. Therefore the task assigned to procedure was to join them together. The task assigned to substantive law and jurisprudence was to keep them apart.

The result of joining law and equity together procedurally and keeping them apart substantively has produced a literature which is very similar to the meditation of St. Augustine on how a perfect God could create sin. In the same way, why should a perfect set of legal rules require equitable interference? It was of small importance to those trained in this way of thinking that abstruse controversies as to whether equity really assisted the law, or whether it conflicted with it were completely inadequate to determine such very practical matters as what counterclaims might be filed, and when jury trials might be had. Therefore, cases are still being reversed because the parties fail to formulate their pleadings so that they fit into the picture of a single court with separate compartments of justice and mercy. It is still of great importance in numerous instances to decide whether, in a state which has abolished the distinction between law and equity, so far as the forms of pleadings are concerned, a given set of pleadings are in substance law or equity. The worry about the procedural effects of this distinction continues to produce a fair proportion of absurd results, because subconsciously we fear that if we cease to worry about the distinction in procedure, it will disappear in substance.

Perhaps, with the rise of regulating tribunals, we are destined to go through a similar procedural struggle in the effort to keep regulation ideologically apart from trial by combat, and at the same time use both ideals to solve particular situations. The three-story structure of law, equity, and administrative law is

fearful to contemplate, but nevertheless it is a distinct possibility. There are plenty of legal scholars abroad in the land who will welcome the opportunity to devise the nice distinctions required for such a structure. There are countless legal periodicals anxiously writing to everyone who is suspected of legal learning to acquire more of the type of articles which they have been accustomed to publish. A new field is opening up, awaiting dialectic exploration and footnotes. It is not likely that writers for law reviews will be content with the advocacy of a simple method of discretionary review of commissions by courts, or with informal procedures by which courts will give speedy answers to questions asked of them in advance of actual trials. It is, therefore, probable that for a time at least the older technique of footnoted fundamentals will be used to determine the time and place of judicial review of regulatory bodies. A practical discussion of these problems is still over the horizon. For a time at least two sets of courts will parallel each other and clash in the haphazard way in which law and equity courts clashed in the past — the one a symbol of a law which is above government, the other a symbol of efficiency and control.

Yet it does not seem likely that the dialectic and philosophical struggle which attended the separation of law and equity courts and their final, though incomplete, amalgamation will be duplicated in the development of administrative courts today. That struggle was the result of a feeling that not even court procedure could be planned in advance, because any regulation which did not arise from trial by combat was dangerous. It arose in an atmosphere which feared any departure from the past. Economic science was devoted to pointing out the dangers of humanitarian ideas and constantly reinforcing the fundamental economic principle that no good could come as the result of planning. The notion of experiment with social organization, voiced by the President of the United States, would have been denounced by both liberals and conservatives only a short time ago. Fundamental principles were sought by everyone. The practical convenience of the day was considered of little importance. Every governmental proposal from the child labor amendment down to a minor reform of pleading was judged in the light of its tendencies for the future. The very fact that the immediate object aimed at was of

unquestioned validity was deemed to make the proposal a trap to catch the unwary. Since governmental regulation was bad, and since governmental planning was impossible, it followed that any temporary good results would inevitably be followed by permanent bad ones. Any one can follow a principle when it is to his own immediate advantage. The real man of principle cares more for his principle than any possible advantage he may derive from abandoning it.

This way of thinking is disappearing.<sup>35</sup> There are signs everywhere that government regulation is becoming an accepted ideal.

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<sup>35</sup> We quote, as illustrative, from articles written by three leading lawyers who appear clearly to recognize the changes in judicial attitude necessary in a time of increasing legislation. Rogers, *The Mold of Nationalism on Law and Statecraft* (1933) 19 A. B. A. J. 693, 697: "The lawyer's employment and his technique will alter. The wholesale resort to a wide authority and discretion entrusted to public officers is not only the tendency of the hour everywhere but seems a necessary demand for the execution of rapid experiments in social management, the inculcation of new conceptions and the alternation of permission and refusal explicit in a program of a disciplined economy. The common law has had little sympathy for such wide official scope. It scorns such marching and counter-marching and dreads its abuse. The judicial proceedings favored by the common law are characteristically begun after the event. . . . While the new régime repudiates many tenets of English common law, it cannot be left free to proceed without chart or principle. New doctrines must be found. The outlines of economic laws, industrial practice and other social observations have already superseded older legalistic guides in the conduct of railroad and public utility tribunals on this continent. The same type of resort to wide fields of observation or learning seems natural for the spread of administrative practices over the whole field of business. The lawyer must outline new rules and systems for control of administrative discretion. He must invent them or find them in Roman and Eastern sources. He must apply himself to social principles our law books never bound in print." Cuthbert Pound, *supra* note 14, at 313-14: "Might the court, restored to its once narrow but important duty to harmonize conflicting decisions of the Appellate Divisions and to decide great public questions, be empowered, without placing too heavy a burden of work on it, to act in the capacity of a ministry of justice or, with certain additions from bench and bar, as a judicial council, centralizing the machinery for the distribution of judges for trial work and formulating restatements of the law for legislative action? Or must individualistic judges continue to run their own assignments at will as to hours of labor and length of terms? Must rules of law continue to be stated by the courts only as they arise in litigation between private individuals in which the state has no interest and be so stated in accordance with precedent, if precedent exists and may not be avoided?" See also Stephens, *What Courts Can Learn from Commissions* (1933) 19 A. B. A. J. 141: "Probably all is not perfection in the commissions in the respects referred to; but the freedom of administrative tribunals from legislatively laid down practice, their power to make their own rules, and to amend them to conform to the actualities of the problems to be met and the types

If this is so, courts may be expected to follow that way of thinking in relation to their own processes. Judged by the ideal of efficient planning, trial by combat in the field of governmental regulation will appear more and more absurd. A judicial system which achieved practical results in the difficult philosophical atmosphere of the past should have little difficulty if the intellectual labor of reconciling all their practical results with a conflicting philosophy is removed.

The requirements necessary for an orderly review of administrative tribunals are relatively simple once we rid them of their philosophical trappings. The machinery for satisfying these requirements is already at hand, having been developed *sub rosa* out of the necessities of the past. We will briefly enumerate them.

(1) There must be a method by which judicial approval of a regulation may be tentatively given during an experimental period. We have instances of this already. In the *Appalachian Coals* case<sup>36</sup> the Supreme Court indicated that its decision was operative for the time being only, and might be modified by subsequent changes of conditions. The case was kept alive expressly for that purpose. Such a device applied to the codes would give a temporary validity or a temporary suspension of code provisions which could be later modified.

(2) Cases involving approval or disapproval of administrative regulations must be considered in the light of interests of whole groups of people. Two parties must not be permitted to control the entire litigation. The analogy of the creditors' suit which begins a corporate reorganization may be useful here. Such a suit is supposed to be representative. All sorts of conflicting interests have a standing for appeal. Suits for injunctions against provisions of NRA codes may be twisted into the same form, to enable courts to treat such litigation as determining the broad principles under which whole groups of conflicting interests must be reconciled.

(3) There must be speedy methods of appealing precise questions to the Supreme Court of the United States, unencumbered

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of cases to be tried, gives them a freedom of choice and a resultant simplicity of procedure which they will do well to retain, and with which courts might wholesomely be endowed."

<sup>36</sup> See note 23, *supra*.



with procedural formulae. The method of certifying questions to be answered is suggested here as a useful analogy.

(4) There must be some planned participation of federal courts in governmental regulation. The power of the court to make equity rules, together with the conference of Senior Circuit Court Judges may stand in good stead here, aided perhaps by legislation.

None of this machinery was available when equity and law began and ended their long conflict. These two ways of talking and thinking existed at a time when the conception of a judiciary which talked in parables about ancient battles between litigants was uppermost. Once regulation is established, the parable way of talking becomes difficult to maintain. The battery of legal analogies which may be applied to any case which starts as a contest is much more difficult to apply to a case which starts to interpret a rule already formulated. The difference between French and American digests of law bears witness to this.

A period of confusion, during which the judicial participation will be confused and uncertain, is inevitable. Yet in an age when orderly planning is regarded everywhere as a possibility, where *laissez faire* is no longer the ultimate ideal, it is probable that courts also will be driven to intelligent procedural planning. The hit-or-miss methods of waiting until Providence leaves just the right case at the judicial doorstep before giving a waiting industry any enlightenment is apt to appear in the future less rational than it did in the past.

### CONCLUSION

Judicial systems seldom respond to exhortations of reformers that they become practical and efficient. They constantly show a resistance to the demands of everyday needs. When considerations of efficiency are forced upon them, legal scholars usually rush to the defense to show that in the long run an inefficient method of doing things is more efficient than an efficient one would be. Government never is what it ought to be, yet all rules must be based on government as it ought to be. We cannot make rules to apply to government as it is without abandoning our ideal. It is, therefore, natural that our most cherished legal phrases should be more decorative than sensible. Too much common sense, however, cannot be applied to institutional utterances. On the New

York post office is the motto: "Neither snow nor rain nor heat nor gloom of night shall stay these messengers from the swift completion of their appointed rounds." Common sense tells us that this means only that mail will be delivered even in bad weather. A longer motto on the Washington post office means that mail is only delivered to nice people for laudable purposes. Yet who wants to strip these mottoes of their decorative quality so long as they tend to create loyalties and enthusiasm? The same may be said of the elaborate formulae surrounding trial by combat. So long as they met a deeply felt emotional want, the mere fact that they were not what they pretended to be, that they could not be a sensible way of investigating the truth or a rational way of making a system of regulations, in no way affected their vitality as an ideal.

Those who misunderstand the function of courts are constantly engaged in the game of finding some ill-defined group on whom the blame for the practical failures of the institution may rest. They denounce the stupidity of judges, the lack of integrity of shysters, or the selfishness of the bar — just as if these were organized groups endowed with a group freewill. The double rôle which courts play in satisfying both the practical and pontifical needs of the time, appears to such persons hypocritical. Confusion of terminology resulting from the conflict of unexamined emotional values, such persons think, can be solved by clearer definition. Thus thousands of pages are written to make the definitions surrounding trial by combat in its conflict with social justice and administrative control definite and certain. This is done in utter disregard of the fact that once a word is elaborately defined it becomes useless as a medium of compelling definite action.

Such attempts are inseparable from the judicial process. They perform a useful function, because by seeking definiteness we gain elasticity; through confusion of terms we gain freedom from terms. Without this process of constant and conflicting definition, *stare decisis* would not be the easy method of escaping from precedent which at present constitutes its most outstanding utility. It is of course true that our great definers are unaware of the part they play in giving to the law that flexibility which comes only from arguments and analogies which lead both ways. Yet that

very fact makes them play their part better. There is, therefore, a practical elasticity in the old ideals which permits almost any degree of judicial review of regulation at the price of conflict and cumbersome formulae for administrative law.

Yet, if the American people once accept regulation as a normal function of government, we may no longer feel the emotional need of trial by combat. If this happens we may then expect our courts to proceed with greater simplicity and greater efficiency as part of a uniform judicial system. Regulation, we suspect, is here to stay. We also predict that the ideal of an independent judiciary above the regulative departments of the government is as strong as ever. The greatest obstacle to sensible judicial review of regulation lies in the notion of trial by combat with its search for the definite issues without which no contest can be staged. There is at least some evidence that this notion is disappearing, and that public psychology is ready to accept a unified instead of a double-headed system. If so, the long and cumbersome conflict between law and equity may not be repeated with the rise of administrative regulation.

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